Local Government Sales and Use Taxes

by M. Patrick Wilson and Christopher Price

This article describes the law concerning sales and use taxes imposed by local governments on goods and services, the procedures governing the collection of those taxes, and issues that have been litigated by governments and taxpayers.

Sales and use taxes are a significant source of revenue for local governments. These taxes make up as much as three-quarters of annual general purpose revenue in municipal budgets and up to one-third of total revenue for county budgets.[1] They also represent a potentially significant expense to those who pay these taxes—the purchasers and consumers of the taxable products and services. For product vendors and service providers, sales and use taxes increase the total "cost" of their taxable goods and services. Because sales and use taxes affect local governments, businesses, and consumers, it is important to understand the relationship between sales and use taxes, the types of transactions to which these assessments apply, and the means by which these taxes may be enforced and challenged.

This article focuses on sales and use taxes imposed by Colorado municipalities and counties. The state of Colorado also imposes its own sales and use taxes, and although there are many parallels between state and local taxes, the state's sales and use tax scheme is beyond the scope of this article.[2] This article addresses the nature and purposes of sales and use taxes, as well as the distinction and relationship between these two complementary taxes. The article also discusses the taxing jurisdictions that impose sales and use taxes and the types of transactions that often are subject to the tax, and provides an overview of how those taxes are assessed, collected, and enforced. Finally, the article addresses the procedural means by which sales and use tax assessments may be challenged by taxpayers and some of the substantive issues raised in those protests.

Overview

In Colorado, individual consumers are largely accustomed to paying sales tax on many of their retail purchases and rarely question or dispute the collection of sales tax by the vendor. It simply is an expected and often unnoticed element of a retail transaction. Individual consumers are not often faced with paying a use tax directly, because their purchases are usually made from licensed vendors who collect a sales tax on the transaction. However, where a vendor does not collect a legally imposed sales tax for some reason, a use tax may be assessed against the consumer.

Even though it may be owed, a use tax on consumer transactions is not often enforced or collected from nonbusiness consumers. This is due to the difficulty in tracking and collecting a use tax on individual consumer purchases, limited enforcement resources, and the disproportionately high transaction costs on what often are relatively low-dollar-value purchases.

Businesses, on the other hand, tend to make purchases that have a higher taxable value than individual consumer purchases, they tend to maintain better records of purchases, and they sometimes can pass on the cost of a use tax to their customers. As a result, use taxes are more regularly collected from businesses. With limited audit and enforcement resources, local governments tend to focus their use tax collection efforts on business purchases, because they have the potential to provide more revenue and are more easily tracked and collected.

Sales and use taxes typically apply to retail transactions, as opposed to wholesale transactions. Wholesale transactions involve taxable products that are purchased for subsequent resale and often are specifically exempted from sales and use tax. Retail transactions, on the other hand, generally consist of goods and services that are not going to be resold; instead, they are consumed or used by the purchaser. Retail vendors operating within a taxing jurisdiction are required to be licensed by the jurisdiction and to collect sales tax from their customers on retail transactions of taxable products and services. Failure to collect a required sales tax can result in enforce-

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ment by the local taxing authority against the vendor for a sales tax deficiency, or against the purchaser for use tax.

When businesses purchase items for their own consumption and use and the appropriate local sales tax is not collected by the vendor, a use tax may be owing as a substitute for the sales tax. It is in this sense that the use tax is said to be a complement to the sales tax. For example, when a business located within a taxing jurisdiction purchases a taxable product or service from a vendor located outside the taxing jurisdiction, the vendor may not have collected the jurisdiction's sales tax. A vendor located outside the taxing jurisdiction may not be required to be licensed and to collect the sales tax imposed by the taxing jurisdiction. In lieu of the sales tax, a use tax may be imposed and collected from the user or end consumer of the taxable product or service once it is used within the taxing jurisdiction. In this manner, the use tax can be seen not as a separate or independent tax, but simply as a complement or alternative to the sales tax.[3] If a jurisdiction's sales tax has been paid and collected on a given transaction, the use tax will not be owing, and vice versa.

Collection of sales and use tax is largely by voluntary compliance. Licensed vendors remit sales tax amounts collected from their customers on a periodic basis and businesses file periodic use tax returns for transactions on which sales taxes have not been paid or collected. Enforcement of sales and use taxes typically is by audit of business records. If a deficiency is identified and is not corrected, the local government usually issues a notice of deficiency, assessment, and demand for payment. In addition to demanding payment of the tax claimed to be owing, the local government also may assess penalties for nonpayment, as well as interest on the amount claimed to be owing. If a prompt resolution of the assessment discrepancy is achieved, many local governments have the authority to waive or reduce the penalty and/or interest payments.

Formal protests over whether a local sales or use tax is owing are almost always brought by businesses—either as retail vendors on sales tax amounts, or as purchasers and consumers for use tax amounts. Purchases by individual consumers often are not only too small to warrant a protest, but also the items and services typically purchased by individual consumers tend to more clearly fall within or without an easily defined taxable category or exemption. Business transactions, on the other hand, may not as clearly fall within a taxable category, or may be subject to certain exemptions specifically targeted for certain industries.

To preserve the right to contest a final assessment, a formal written protest must be lodged promptly with the taxing jurisdiction, often as early as twenty days from the date of the notice of deficiency, assessment, and demand for payment. If the taxpayer and the local government cannot resolve the dispute informally, the local government typically provides an administrative hearing.[4] An appeal from that administrative hearing may be taken to either the Colorado Department of Revenue[5] or, if only one taxing jurisdiction is involved, directly to the district court.[6] Failure to comply with the protest procedures can result in the protest being dismissed.[7]

Sales and Use Taxes Generally

Sales and use taxes are a form of excise tax "imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege."[8] Sales tax is levied on the "sale of property with the amount of the tax based on a percentage of the purchase price paid or charged for the property exchanged in the sale."[9] Use tax, on the other hand, is levied on "the privilege of storing, using, or consuming . . . property" within the taxing jurisdiction.[10] The use tax also is based on the stated purchase price or value of the product or service being taxed. Use tax is designed to complement the sales tax and to equalize the tax burden between in and out of jurisdiction purchasers.[11] Thus, with the use tax, "the burden on the taxpayer should be no greater than necessary to compensate for the sales tax originally avoided on the purchases."[12]

For this reason, a jurisdiction's sales tax rate is usually equal to its use tax rate. A party who purchases a taxable product or service in a jurisdiction without paying sales tax must pay use tax in the jurisdiction where the good is used or consumed.[13] The use tax thereby takes away the incentive to purchase products and services from vendors located outside the taxing jurisdiction.

Generally, a use tax should never be owing to the same taxing jurisdiction that has previously collected a sales tax on the same transaction. Similarly, most taxing jurisdictions recognize and provide a credit for local sales or use taxes that are legally imposed and actually paid to another local government. Thus, for example, if a taxable product is purchased by a Thornton business from a Denver vendor, the Denver vendor collects Denver's sales tax of 3.69% on the transaction. When the product is brought to Thornton for use, the city of Thornton does not assess its full 3.75% use tax on the purchaser. Thornton will recognize and give credit for the sales tax paid to Denver up to the amount of Thornton's tax rate.

Thus, a business that purchases a taxable product in Denver, pays the Denver sales tax, and then brings the product into Thornton for its ultimate use would pay Thornton a use tax of 0.14% on the price of that product. This amount represents the difference in the amount of municipal tax imposed.[14] If Thornton's tax rate had been lower than Denver's, Thornton would not have assessed any use tax, but also would not issue a refund to the taxpayer on the difference. This recognition and credit for sales and use taxes paid in other similar jurisdictions is necessary to avoid double taxation.

Local Taxing Jurisdictions

Most municipalities and counties have a sales tax, a use tax, or both. However, as of 2007, there were thirty-five municipalities and twelve Colorado counties that did not impose either tax. All Colorado municipalities and counties are authorized to adopt a sales and use tax pursuant to Colorado law.[15] Statutory municipalities are limited as to the goods and services they may subject to sales and use tax.[16] Statutory municipalities are authorized to levy sales tax on the sale of tangible personal property sold at retail,[17] intrastate telephone and telegraph services,[18] gas and electric service,[19] food and drink served or furnished in various establishments,[20] and the "entire amount charged to any person for rooms or accommodations. . . ."[21] Although statutory municipalities may subject all tangible personal property to sales tax, they may levy use tax only on construction and building materials and vehicles that require registration with the state.[22] These same limitations generally apply to Colorado counties, which also may enact sales and use tax ordinances.[23]

In addition to the authority provided statutory municipalities, home rule municipalities are authorized to levy and collect sales and use tax pursuant to Article XX, §§ 1 and 6 of the Colorado Constitution.[24] Because the imposition of sales and use tax is a

local concern, home rule municipalities have a good deal of autonomy to define what is subject to sales and use tax and what is exempt.[25] With this broader authority, home rule municipalities may exceed the state statutory limitations as to what they may subject to sales and use tax. In general, this means that all tangible personal property and a variety of services may be subject to either a sales or use tax in a home rule municipality. Although home rule municipalities have autonomy as to these substantive tax issues, for purposes of statewide uniformity, they are required to comply with the procedural aspects of taxpayer protests under CRS § 29-2-106.1.[26]

In addition to the state of Colorado, counties, and statutory and home rule municipalities, a number of other governmental entities are authorized to collect sales and/or use taxes, including the Regional Transportation District,[27] the Scientific and Cultural Facilities District,[28] and the Metropolitan Football Stadium District.[29] A number of other special purpose districts and authorities also are authorized to impose a sales and/or use tax, including local improvement districts, mass transit districts, rural transportation authorities, and housing authorities.

Taxable Transactions

For statutory municipalities, tangible personal property purchased at retail and certain services are subject to sales tax.[30] Tangible personal property is "property that can be seen, weighed, measured, felt, or touched, or is in any way perceptible to the senses."[31] This definition obviously includes an almost infinite number of products. Most local governments impose a tax on the broad array of tangible personal property, subject only to various exemptions and limitations. For such property to be subject to tax, it must be sold at retail, which is any sale that is not wholesale.[32] Generally, wholesale sales are those where the purchaser intends to resell the good at retail or to incorporate the good as a component part into a finished product that subsequently will be sold at retail.[33]

Although all retail purchases of tangible personal property may be subject to tax, statutory municipalities and counties are limited in the types of services that may be subjected to sales tax.[34] For a home rule municipality, there are no limitations on the types of services that may be subject to tax. However, in practice, it appears that home rule municipalities typically apply sales tax only to specifically enumerated services. Examples of services that are subject to home rule taxes are:

1) certain services provided in connection with the furnishing or renting of property;[35]
2) services provided to render property in a form that is usable by the purchaser of the property;[36]
3) telecommunications, gas, and electric services;[37]
4) informational or entertainment services provided via the transmission of electromagnetic waves;[38]
5) labor or services provided in connection with a tailor-made or custom product;[39] and
6) security and burglar alarm monitoring services.[40]

Taxable goods and services also are subject to a number of common exemptions. Examples are:

1) wholesale sales to retailers;[41]
2) ingredients or component parts used in manufacturing goods to be sold at retail;[42]
3) purchases by governments and charitable organizations;[43] and
4) sales of construction and building materials if the purchaser presents a valid building permit demonstrating that a local use tax has been or will be paid.[44]

Assessment, Collection, and Enforcement

The Colorado Department of Revenue collects sales taxes levied by statutory municipalities, counties, and certain special districts.[45] The Department of Revenue is authorized to collect sales tax for home rule municipalities, but to do so, a home rule municipality must agree to conform its tax provisions to certain statutory requirements.[46] Many home rule jurisdictions self-collect sales tax. To assist retailers as to the proper assessment and remittance of sales tax, the Department of Revenue maintains a list of all municipalities' sales and use tax rates, the municipalities for whom the Department of Revenue collects sales tax, and the exemptions that apply to the taxes.[47] The Department of Revenue does not collect use tax for municipalities. To assist with uniform collection of sales and use tax, the Department of Revenue has adopted a standard sales and use tax reporting form.[48] The frequency with which retailers must remit sales tax generally depends on the amount of sales tax that is collected on a monthly basis.[49]

To ensure that the proper amount of tax is being collected and remitted, municipalities and counties conduct periodic audits of businesses operating in their jurisdictions. If audits reveal tax owing that has not been collected or remitted, local governments issue notices of deficiency, which must be sent by certified mail.[50] The deficiency notice must state the amount of "sales and use taxes due" and inform the taxpayer of its right to protest the assessment and to request an administrative hearing.[51] If a taxpayer fails to submit such written request within the time proscribed by the local jurisdiction, the taxpayer will have waived its right to appeal the amounts in the notice of deficiency and they will become due and owing.[52]

Assuming a taxpayer submits a timely request for a hearing, the taxpayer is required to exhaust local remedies before appealing the decision of the municipality to the Department of Revenue or to the district court. The phrase "exhaustion of local remedies" is described in CRS § 29-2-106.1(2) and (8)(b), in identical terms and covers all taxpayer appeals. The description of "exhaustion of local remedies" anticipates that a municipality will hold a hearing and issue a final decision within ninety days of receipt of the taxpayer's request for an administrative hearing.[53] If the municipality has conducted a hearing and issued a final decision within ninety days of the initial request, the taxpayer must file an appeal within thirty days of the final decision.[54] When the taxpayer requests a delay in holding the hearing, the hearing nevertheless must be held and a final decision issued within 180 days of the initial request.[55] The taxpayer then will have thirty days from that final decision to file an appeal.[56]

The phrase "exhaustion of local remedies" also includes those instances in which no hearing is held or no final decision is issued within ninety days (or, as the case may be, 180 days) of the taxpayer's request for a hearing.[57] Then, the exhaustion of local remedies occurs no later than ninety or 180 days after the initial request for a hearing, and the taxpayer must file an appeal within thirty days after the expiration of the ninety or 180 days.[58] If the taxing jurisdiction does not issue a final decision within the prescribed statutory time limits, the taxpayer may deem its protest denied and its local administrative remedies exhausted, and may seek further review.[59] Thus, absent an agreed-on extension, there is no situation or circumstance under which an appeal can be filed later than 210 days after the submission of the initial request to the local government for an administrative hearing. However, if the municipality has adopted an alternative appellate procedure to that provided in CRS § 29-2-106.1, it cannot deprive a taxpayer of the right to appeal simply by not holding the administrative hearing.[60]

A taxpayer that has properly exhausted its administrative remedies and wishes to further appeal the assessment may seek a secondary administrative review before a hearing officer at the Department of Revenue, after which an appeal may be taken to the district court.[61] Alternatively, a taxpayer may appeal from the local government's administrative hearing directly to the district court if the tax dispute involves only one taxing jurisdiction.[62] The hearing before the Department of Revenue is to be conducted in accordance with the procedures governing state tax appeals to the Department of Revenue.[63] The hearing is to be *de novo*, without regard to the prior administrative hearing of the local government, and with the taxpayer bearing the burden of proof.[64]

Appeals to district court, whether directly from the local government or from the Department of Revenue, also are to be conducted in accordance with the procedures governing state tax appeals.[65] The district court is to hold a *de novo* hearing, without

regard to the prior administrative hearing of the local government or the Department of Revenue.[66] Both taxpayers and local governments may appeal a decision of the Department of Revenue. If the taxpayer pursues an appeal from a determination of the Department of Revenue, it bears the burden of proof. If the local government is the appellant, the taxpayer has the burden of proof with respect to all factual matters, and the local government bears the burden with respect to any legal determination of the Department of Revenue that the local government seeks to reverse.[67]

A taxpayer alternatively may elect to pursue any other remedy that may be provided for in the local jurisdiction's ordinance, such as the right to seek judicial review pursuant to C.R.C.P. 106(a)(4).[68] As long as the appellate avenues provided for in CRS § 29-2-106.1 are available, a tax jurisdiction may offer such an alternative process. If such an alternative avenue is pursued by a taxpayer, the provisions of that appellate avenue control over any contrary provisions in CRS § 29-2-106.1.[69] If used, all of the appellate procedures outlined in CRS § 29-2-106.1 are mandatory, have been deemed to be a matter of statewide concern, and apply equally to counties and statutory and home rule municipalities.[70]

Taxpayer Challenges

The basis for taxpayer challenges to local sales and use tax assessments are varied. Taxpayers often claim that a taxing ordinance or code provision simply does not apply to a given transaction or that an exemption applies but was not properly recognized by the taxing jurisdiction. Taxpayers also may challenge an assessment based on an alleged computational or valuation error, such as where the tax may have been assessed on the same transaction twice, or was based on the wrong value. Challenges also are based on claims that the tax should be offset or reduced due to the prior payment of tax to another local jurisdiction, or because the assessment seeks taxes that came due beyond the typical three-year statute of limitations.[71] Claims that an assessment of local tax is barred by the Taxpayer Bill of Rights (TABOR) amendment[72] or preempted by provisions of federal law also may be raised.[73]

In considering a sales and use tax protest, courts do not view the power to impose taxes expansively.[74] Rather, tax provisions will not be extended "beyond the clear import of the language used, nor will their operation be extended by analogy."[75] Thus, when interpreting laws that impose taxes, reviewing courts are to construe all doubts against the government and in favor of the taxpayer.[76] However, once taxation is authorized, the presumption is that taxation is the rule and exemption from taxation the exception.[77] The absence of an express exemption indicates a legislative intent to tax.[78] In fact, many local tax codes specifically provide that a transaction is deemed to be subject to tax unless a specific exemption applies. Unless the code, statutes, or constitution place the property within a stated category of exemption, courts must resolve doubts regarding the meaning of tax provisions in favor of subjecting the transaction to the payment of its fair proportion of taxation.[79] Because taxation is presumed, courts strictly construe tax exemptions and place the burden on the taxpayer to prove an entitlement to an exemption from tax.[80]

Sales and Use Tax Issues

A very broad range of transactions are potentially impacted by local sales and use taxes. Taxpayer protests against the assessment

of local sales and use taxes take a variety of forms and often raise complex issues. Several recent and important appellate decisions involving sales and use tax issues are addressed below. From this case law, there are many underlying themes and lessons applicable to all local jurisdictions. However, differences in tax code language from jurisdiction to jurisdiction (especially with home rule municipalities) necessitates caution in applying these appellate decisions to tax disputes governed by different code language.

Tangible Personal Property Sold in Conjunction With Services

The sale and/or use and consumption of tangible personal property is almost universally subject to sales or use tax, subject to certain exclusions and exemptions. Statutory municipalities and counties may tax only certain enumerated services.[81] However, home rule municipalities have no such restrictions on the types of services they may subject to sales or use tax. Most home rule jurisdictions only assess sales or use tax on specifically enumerated services.

Some local tax codes assess sales and use tax on services that are provided in conjunction with the sale, rental, or use of tangible personal property. Often, if the charges for the services are separately stated from the property provided, they will not be taxed. However, if there is one charge for the tangible personal property and services, the entire amount may be taxable. In *Waste Management of Colorado, Inc. v. City of Commerce City*,[82] sales and use tax had been assessed on two types of transactions that took place within Commerce City. The first involved Waste Management's furnishing of roll-off containers (large dumpsters) to its waste removal customers located within Commerce City. Waste Management provided an empty roll-off container on a customer's request and then picked up the container after the customer filled the container with waste. Waste Management subsequently disposed of the waste contained in the roll-off container. Waste Management did not collect city sales tax on these transactions.

The other type of transaction involved third-party contractors who provided Waste Management with trucks and drivers to haul Waste Management's trailers from its waste transfer facility in Commerce City to the regional landfill or other disposal site, and then to return the empty trailers to Waste Management. The third-party contractors did not collect city sales tax on these transactions and the city sought to collect use tax from Waste Management. In neither transaction were the service charges separately stated from the charges for the use of the property. The city claimed that tax was due on both types of transactions based on its code, which applies the city's tax to transactions in which tangible personal property is in any manner furnished or used in connection with the provisions of services, except for certain defined "service contracts" that are specifically exempted under the code.

On appeal from the city's administrative decision, the district court determined that neither transaction was taxable under the city's code, because it found that the predominant or underlying purpose of both types of transactions was the provision of services. As a result, there was no taxable charge or price paid for the furnishing of tangible personal property. The Colorado Court of Appeals affirmed the district court's order, finding that the code was ambiguous.

In resolving that ambiguity, the court of appeals relied on the "common understanding" test from *City of Boulder v. Leanin' Tree*[83] to determine whether the transactions should be subject to tax. Under the common understanding test, the court of appeals characterized both types of Waste Management transactions as being more analogous to transactions for services than transactions for tangible personal property. Accordingly, the court held that neither transaction was subject to sales or use tax. The city had contended that the common understanding test may be applicable in instances where a code taxes either tangible personal property or services, but not where a code expressly extends its tax to these hybrid transactions that necessarily involve both tangible personal property and related services.

In an earlier case involving state sales and use taxes, the Colorado Supreme Court applied a "separability test" to determine whether a transaction involving both tangible personal property and services was subject to the state of Colorado's tax. In *A.D. Store Company, Inc. v. Dept. of Revenue*,[84] the taxpayer sold clothing and offered tailoring services for the clothes that it sold. The transactions at issue involved both property and services, and the state sought to collect sales tax on the amount charged for both the initial purchase of the clothing and the alteration service. The taxpayer objected to the assessment of tax on the tailoring services. The Supreme Court found that because one could obtain the clothing separately from the alteration services, the two elements of the transaction (property and services) were separable and, thus, the tax fell only on the sale of the actual clothing and not on the alteration services. By necessary implication, had these two elements of the transaction not been separable, the entire transaction (property and services) would have been taxable.

Tangible Personal Property Sold in Conjunction With Intangible Property

In *Leanin' Tree*,[85] the Supreme Court resolved a dispute as to whether transactions that involved intangible (intellectual) property with some tangible personal property were subject to the city of Boulder's use tax. The taxpayer there manufactured and sold greeting cards and other gift products containing images of original artwork created by independent artists. The taxpayer entered into license agreements with these artists by which it was permitted to reproduce, alter, and publish the images. Royalties were paid to the artist on the sale of any merchandise containing the artist's work. If no product was sold containing an artist's work, nothing was paid to the artist.

The Supreme Court noted that the city of Boulder's tax regulations expressly required transactions that involve both tangible personal property and "other than tangible personal property" to be characterized according to the transaction's "true object" for purposes of sales and use tax assessments.[86] Where a transaction involved both tangible personal property and other than tangible personal property, and those elements cannot be meaningfully separated, the Court found that, to determine the taxability of such a transaction, some "multi-factor or totality of circumstances test, permitting characterization of the transaction according to a reasonable and common understanding of those concepts, is virtually unavoidable."[87] Because the taxpayer card company was using the artists' work to create a new product, and because the artists were compensated based only on sales of that product, the Supreme Court found the transaction to more predominately involve the right to use the artists' work (an intangible right) than the artwork itself (the transfer of tangible personal property); therefore it was not taxable under Boulder's code. It used a totality of the circumstances or common understanding test to determine whether a hybrid tangible/intangible property transaction was subject to tax as a transaction of tangible personal property.

In *Noble Energy, Inc. v. Colorado Dep't of Revenue*,[88] the state of Colorado sought to impose use tax on fracturing sands provided by an oil and gas exploration company in connection with fracturing services by which sands and other fluids are forced into natural gas wells to create fractures in the formations below the surface that contain the natural gas. There, the Court of Appeals found that the sale of the fracturing sands were not taxable, because that tangible personal property was inseparable from the services provided. Further, the court found that the taxpayer's objective was not to consume fracturing sands, but to receive fracturing services, and that under *Leanin' Tree*, the true object of the transaction was to provide a service to the taxpayer, not the sale of tangible personal property.

Where a purchase of services necessarily includes or enables the customer to use tangible personal property, the transaction may be taxable. In *AT&T Communications v. City of Boulder*,[89] the city of Boulder assessed sales tax on AT&T's purchase of telephone access services from Mountain Bell by which AT&T was able to access Mountain Bell's local telephone lines and customers to connect

local telephone lines to interstate lines for long-distance telephone calls. AT&T objected to the tax and argued that it was buying only services, which were not taxable under Boulder's tax code. However, the court noted that by purchasing the access services, AT&T necessarily was allowed to use Mountain Bell's transmission and switching equipment to route its calls to and from Boulder. Although other services also were included in AT&T's transaction, because AT&T was provided the use of Mountain Bell's equipment, it was a taxable rental of tangible personal property.[90]

Wholesale Versus Retail Transactions

Typically, only retail transactions are subject to sales or use tax. Retail transactions are commonly defined as all sales of taxable goods or services that are not wholesale. A wholesale purchase is one that is made for resale. For example, when a department store purchases a shipment of shoes from a manufacturer or distributor, the department store's purchase is a wholesale transaction, because these shoes will be subject to a later retail sale to customers of the department store. The department store's original purchase from the manufacturer or distributor typically is not subject to sales or use tax due to an express exemption for wholesale transactions. When the store resells the shoes to its customers, those retail transactions generally are subject to sales tax. An analogous exemption is commonly found for purchases of ingredients or component parts by a manufacturer to create new products that in turn are sold at retail.

Occasionally, it may be difficult to determine whether a particular transaction constitutes an exempt wholesale or taxable retail sale. Movie theaters have attempted to avoid local tax on their purchases or rentals of film reels from film distributors on the ground that these purchases were exempt wholesale transactions. The theaters contended that it was the theater-going patrons who were the ultimate consumers of the films, and the theaters' purchases from the film distributors therefore should be classified as wholesale purchases for resale to the customers.[91] The court of appeals has rejected this theory on the ground that it is the movie theaters —not the customers—that are the ultimate user of the film reels acquired from distributors. The theater customers are not given possession of the film reels, but instead are simply given a temporary right to view film as projected onto the screen by the theater.[92] The court concluded that the movie viewers are no more consumers of film reels than they are of "seats, screens, or projectors used in movie theaters."[93] However, where an adult "arcade" theater grants to its customers the right to use and control the viewing equipment, the transaction between the theater and customer may be taxable as a license or short-term rental of the viewing equipment.[94]

After making what initially is characterized as a wholesale purchase, a taxpayer who ultimately does not resell the item purchased at retail, but instead consumes the taxable product or service itself, likely will have to pay the tax belatedly. In *International Business Machines (IBM) v. Charnes*,[95] IBM purchased component parts from suppliers for the manufacture of various business machines that were to be subsequently sold at retail. These purchases were treated as exempt wholesale purchases. Occasionally, however, IBM would withdraw for its own use certain component parts, partially completed goods, or finished products. Because IBM did not know at the time of the original purchase which or how many component parts would be removed from inventory and consumed by it, no sales tax was paid on these initial purchases on account of the wholesale/manufacturing exemption. Accordingly, the purchases of these component parts "appeared to be wholesale" when first made.[96]

In examining IBM's subsequent withdrawal and use of its inventory, the Colorado Supreme Court found that "even though an inventory withdraw triggers the use tax belatedly, in essence it triggers a retroactive recognition that a previous purchase earlier thought to be wholesale actually was retail."[97] The original exempt wholesale purchase thus is recharacterized as a taxable retail purchase, with the item valued for tax purposes in the form the item was in at the time of the original purchase, because it was the previous purchase that attracted the tax in the first place.[98]

Contractors generally are considered to be the ultimate consumer of the products and construction materials they use in performing

their construction services on a project. As such, contractors generally are not considered to be resellers of the tangible personal property used in those projects and must pay sales tax at the time of purchase. When a manufacturer of tangible personal property uses or consumes items of tangible personal property, a taxable event has occurred.[99] If a legally imposed use tax is paid and collected by another jurisdiction in connection with the issuance of a building permit for the project, and that building permit assessment includes a local government's tax on the materials installed, the contractor may be entitled to a credit for taxes paid to the other jurisdiction.

Simply because an item may be resold does not necessarily mean it is a wholesale transaction exempt from tax. In *International Paper Co. v. Cohen*,[100] the taxpayer sought to sell a box manufacturing plant, along with certain personal property, to an unrelated third party. In an effort to minimize tax liability, the taxpayer formed a limited liability company (LLC), transferred the tangible personal property assets to the LLC, and in exchange, received a membership in the LLC.[101] As part of the same transaction, the taxpayer transferred the membership in the LLC to the unrelated third party for $16.5 million. After being assessed sales tax for the transfer of the personal property assets to the subsidiary, the taxpayer challenged the assessment and contended that there was no consideration paid for membership interest in the LLC and thus no sale on which tax was due. The Court of Appeals rejected this contention on the ground that the $16.5 million paid by the unrelated third party was an adequate measure of the value of the consideration the taxpayer received from the LLC for the membership interests.

Construction and Building Materials

In terms of collecting use tax, statutory municipalities and counties are limited to use tax on construction and building materials and motor vehicles.[102] Although a use tax on motor vehicles is collected in connection with the vehicle registration, the use tax on construction and building materials often is collected in connection with the issuance of a building permit, and the amount collected is based on an estimate of the cost of materials for the project. Many jurisdictions generally consider that half of a project's cost is labor and services, and the other half is materials. On completion of the project, any discrepancy between the estimate used to obtain the building permit and the actual cost of materials may be resolved. Relying on the building permit process to collect use tax is efficient, but does not account for construction and building materials that may be used for projects, such as certain agricultural or industrial improvements, that may not require a building permit. Other jurisdictions collect use tax on construction and building materials based on the actual receipts and invoices for materials, or on other estimates.[103]

In *Board of County Commissioners of the County of Rio Blanco v. ExxonMobil Oil Corp.*,[104] ExxonMobil challenged Rio Blanco's assessment of use tax on construction and building materials used in connection with its natural gas production facilities located in the county. The taxpayer protested the assessment, contending that the facilities and equipment at issue did not consist of "construction and building materials." The court of appeals interpreted the term "construction and building materials" to include only those items that become improvements to real property or otherwise "become such an integral part of the real property as to lose their identity as separate things and have their individual existence merged into that of the realty."[105] The court then found that none of ExxonMobil's facilities consisted of "construction and building materials" so as to be subject to the county's tax.[106]

Transactions Involving Nonprofit Organizations

In *Catholic Health Initiatives v. City of Pueblo*,[107] the Colorado Supreme Court was asked to determine whether a religious nonprofit organization was eligible for a tax exemption. In general, religious and charitable nonprofit organizations are exempt from paying sales and use taxes.[108] However, the exemptions apply only if the purchase, storage, or use of tangible personal property falls within the regular functions or activities of the organization. Catholic Health, a nonprofit religious organization, had constructed a facility in Pueblo to provide "care and housing for the elderly."[109] This facility charged fees based on the services it provided. Following an audit and after determining that Catholic Health had failed to pay the appropriate tax, Pueblo issued Catholic Health an assessment. Catholic Health challenged that assessment, claiming it was eligible for an exemption from tax as a charitable organization as defined by Pueblo's tax code.

In determining whether Pueblo's tax exemption applied, the Court noted that tax exemptions are construed narrowly, with all doubts being resolved against the taxpayer.[110] To be eligible for Pueblo's tax exemption, a charitable organization must show that it "[h]as been certified as a 501(c)(3) organization under the Internal Revenue Code; and is a religious or charitable organization."[111] Under Pueblo's tax code, a charitable organization is:

> exclusively . . . for the benefit of an indefinite number of persons, freely and voluntarily ministers to the physical, mental or spiritual needs of persons, and which thereby lessens the burdens of government.[112]

It was not disputed that Catholic Health was a nonprofit organization. The parties disagreed on whether Catholic Health's activities at its elder care facility qualified it for Pueblo's exemption. The Court found that Catholic Health's elder care facility did not meet Pueblo's definition of charitable organization, because the facility's payment structure was "transactional, rather than charitable" and therefore its services were not "exclusively offer[ed] . . . in a free and voluntary manner." Because Catholic Health did not satisfy the definition of charitable organization under Pueblo's tax code, it was not eligible for the tax exemption.[113]

Products or Services Without a Readily Available Market Value

In *Conoco, Inc. v. Tinklenberg*,[114] the Colorado Court of Appeals was asked to determine whether the city of Commerce City could apply its use tax to property that did not have a readily ascertainable market value. Commerce City applied its use tax to "waste gas," a by-product of the oil refining process that was used by Conoco to maintain heat values at its Commerce City refinery and that enabled it to avoid buying a substitute fuel. The court first determined that waste gas was subject to Commerce City's use tax.[115] However, because waste gas did not have a readily available market value, the valuation of the waste gas was at issue.

Under Commerce City's tax code, use tax was computed based on the "cost or fair market value" of the item at issue.[116] The court determined that the lack of a readily available market for an item otherwise subject to tax "does not . . . preclude application of the fair market value standard."[117] At trial, Commerce City presented expert testimony concerning "both the cost and fair market value of the waste gas."[118] The expert testified that waste gas could be valued by converting the amount of waste gas used by Conoco into a comparable product that did have a readily ascertainable market value. In this case, the comparable product was natural gas. The expert created a formula for converting units of waste gas into comparable units of natural gas using the heat values of each product. Once the amount of waste gas used by Conoco was converted into units of natural gas, the expert multiplied that amount by the wellhead price of natural gas. The court upheld the trial court's determination that Commerce City's formula "reasonably and fairly allowed for the determination of a fair market value of waste gas. . . ."[119]

Doing Business in a Jurisdiction

Often, a taxpayer seeks to challenge the assessment of sales or use tax on the grounds that it does not do business in the taxing jurisdiction, that the transaction lacks the required connection to the taxing jurisdiction, or that the tax is owed or has been paid to another jurisdiction. In *Leggett & Platt, Inc. v. Ostrum*,[120] taxpayers sought refunds of sales tax paid to the city of Thornton on the sale of certain retail store fixtures it manufactured and sold to retails stores such as the Gap. None of the fixtures sold by the taxpayer was used in Thornton; the Gap did not have any retail stores located in that city. However, the fixtures were picked up by the Gap or its hired contractor and were not delivered outside the city by the vendor-taxpayer. Because the Gap, as the purchaser, took possession of the fixtures in Thornton, the transaction was deemed to have occurred in that city and was subject to its sales tax. The city thus denied the taxpayers' request for refunds. Both the Department of Revenue and the district court upheld the city's denial of refund.

The Court of Appeals affirmed, agreeing that possession of the taxable product was transferred to the Gap (through its agents) at the vendor's shipping dock in Thornton and, thus, a taxable event took place in that jurisdiction. Had the vendor–manufacturer hired the common carrier to deliver the fixtures to the Gap's stores located elsewhere, the result likely would have been different, based on provisions in the city's code. Thus, although a connection to the taxing jurisdiction needs to exist, the product or service being sold does not necessarily have to be used in the taxing jurisdiction. If a customer goes to a neighboring jurisdiction to purchase and take delivery of a product, the customer should expect to pay sales tax in that neighboring jurisdiction.

In *Talbots, Inc. v. Schwartzberg*,[121] a clothing store chain paid for the distribution of promotional and advertising material mailed to Denver addressees. The retail advertiser maintained control over the content and distribution of the advertising materials at all times. The city and county of Denver assessed use tax on those materials and the retailer appealed. The court of appeals upheld the tax, finding that the taxpayer-retailer retained control over its catalogs and used them within the meaning of the ordinance by distributing them to potential customers in Denver. This was so even though the taxpayer had no contract with any party in Denver for the printing and distribution of its catalogs. Because the taxpayer retained control over the catalog and had the contractual right to direct, alter, or stop the distribution, it was held to have used the catalog material within Denver.

Conclusion

Issues involving sales and use taxes touch nearly every segment of society, affect many transactions, and to a large degree determine the financial health of local government. Although the sales and use tax implications for many routine types of transactions are well settled, the tax ramifications for new technologies, products, services, and industries often are unknown and uncertain. Questions currently making their way through the courts include how local sales and use taxes apply to the digital aspects of the 21st-century economy, such as downloads and e-commerce. To best advise

clients on sales and use tax matters, the practitioner must be familiar with the pertinent tax laws and judicial decisions and must develop an intimate knowledge of the underlying transactions.

Notes

1. Wilson, "Municipal Taxes," *Financing Municipal Government Series* (Dec. 2010); Department of Local Affairs, "Financial Compendium for Colorado Counties" (Nov. 30, 2009).

2. Although Colorado's sales and use tax is not specifically addressed in this article, there are enough parallels and similarities between the state's sales and use tax and local sales and use tax that case law interpreting one often is used in interpreting the other.

3. *See Howard Elec. and Mechanical, Inc. v. Dep't of Revenue of State of Colo.*, 771 P.2d 475, 480 (Colo. 1989) (Supreme Court "not persuaded to adopt 'an artificial division of the tax scheme' by viewing the use tax as 'a separate tax [that] should be viewed in isolation'" and finding that authorization to collect a sales tax implied the right to collect use tax).

4. CRS § 29-2-106.1(2)(c)(I) and (8)(b)(I).

5. CRS § 29-2-106.1(3).

6. CRS § 29-2-106.1(8).

7. CRS § 29-2-106.1(2)(c) and (8)(b).

8. *Colo. Auto Auction Servs. v. City of Commerce City*, 800 P.2d 998, 1002-03 (Colo. 1990), *quoting Black's Law Dictionary* 506 (5th ed., 1979). *See also Black's Law Dictionary* 585 (7th ed., 1999) defining "excise" as "[a] tax imposed on the . . . sale, or use of goods. . . ."

9. *Colo. Auto Auction Servs., supra* note 8 at 1003.

10. *Bell & Pollock, P.C. v. City of Littleton*, 910 P.2d 69, 71 (Colo.App. 1995), *cert. denied* (Feb. 20, 1996).

11. *Walgreen Co. v. Charnes*, 819 P.2d 1039, 1043-44 (Colo. 1991).

12. *Int'l Bus. Machines Corp. v. Charnes*, 601 P.2d 622 (Colo. 1979).

13. *Id.*

14. *See* www.cityofthornton.net/Departments/Finance/SalesTax/Pages/TaxesExplained.aspx.

15. CRS §§ 29-2-102(1) ("Any incorporated town or city in this state may adopt a municipal sales or use tax, or both, by ordinance in accordance with the provisions of this article. . . .") and -103(1) (same for counties). Both statutory provisions require that any new tax be submitted to a vote by the registered electors of the jurisdiction. Home rule charters have similar requirements of new taxes being submitted to a vote, or requiring a supermajority of council votes. Further, any new tax requires compliance with Colo. Const. art. X, § 29, commonly referred to as the Taxpayer Bill of Rights (TABOR) amendment.

16. *See* CRS §§ 29-2-105 (concerning sales tax) and -109 (concerning use tax).

17. CRS § 29-2-105(1)(a).

18. CRS §§ 29-2-105(1)(d)(I) and -104(1)(c)(I).

19. CRS §§ 29-2-105(1)(d)(I) and -104(1)(d.1).

20. CRS §§ 29-2-105(1)(d)(I) and -104(1)(e).

21. CRS §§ 29-2-105(1)(d)(I) and -104(1)(f).

22. *See* CRS § 29-2-109(1).

23. CRS §§ 29-2-104 (adoption procedures for countywide sales and use tax), -105 (content of sales tax ordinance), and -109 (content of use tax ordinance).

24. *See Berman v. City and County of Denver*, 400 P.2d 434, 437 (Colo. 1965). *See also* Colo. Const. art. II, § 6(g) (Home municipalities have the power to "provide [and] regulate . . . [t]he assessment of property . . . for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments. . . .").

25. *Sec. Life & Accident Co. v. Temple*, 492 P.2d 63, 64-65 (Colo. 1972).

26. *Walgreen Co., supra* note 11.

27. CRS § 32-9-119(2); *Howard Elec., supra* note 3.

28. CRS § 32-13-107 (sales and use tax).

29. CRS § 32-15-110 (sales tax expiring on January 1, 2012). The Metropolitan Football Stadium District sales tax helps pay for the new Mile High Stadium. That tax replaced a similar tax that had been assessed by the Denver Metropolitan Major League Baseball Stadium District that helped pay for Coors Field.

30. CRS §§ 29-2-105(d) and 39-26-104.

31. *Black's Law Dictionary* 1234 (7th ed., 1999).

32. *Int'l Bus. Machines Corp., supra* note 12 at 625.

33. *Id.*

34. CRS §§ 29-2-105(d) and 39-26-104(c), (d.1), (e), and (f).

35. *See, e.g.*, City of Commerce City Sales Tax Code § 20-4-7; City of Thornton Sales Tax Code § 26-389(a)(3).

36. *See, e.g.*, City of Boulder Sales Tax Code § 3-1-1 (definition of "taxable services").

37. *See, e.g.*, City of Lakewood Sales Tax Code § 3.01.120(c) and (d).

38. *See, e.g.*, City and County of Denver Sales Tax Code § 53-25(6).

39. *See, e.g.*, City of Centennial Sales Tax Code § 4-1-210(9).

40. *See, e.g.*, City of Thornton Sales Tax Code § 26-389(a)(19).

41. *See, e.g.*, City of Commerce City Sales Tax Code § 20-5-B-(4).

42. *See, e.g.*, City of Arvada Sales Tax Code § 98-70(9)(g)(1).

43. *See, e.g.*, City and County of Broomfield Sales Tax Code § 3-04-100 (a) and (b).

44. *See, e.g.*, City of Arvada Sales Tax Code § 98-70(9)(j).

45. CRS §§ 29-2-106(1) (municipalities and counties), 32-9-119(2)(c) (Regional Transportation District), 32-13-107(2) (Scientific and Cultural Facilities District), and 32-15-110(2) (Metropolitan Football Stadium District).

46. CRS § 29-2-106(4)(a)(I)(A).

47. *See* Colorado Department of Revenue Form DR 1002 (Aug. 5, 2010).

48. This is required by CRS § 29-2-106(9).

49. *See* www.colorado.gov/cs/Satellite/Revenue/REVX/1178305433486.

50. CRS § 29-2-106.1.

51. CRS § 29-2-106.1(2)(a).

52. CRS § 29-2-106.1(2)(c) and (8)(b).

53. CRS §§ 29-2-106.1(2)(c)(I) and (II) and -106.1(8)(b)(I) and (II).

54. CRS § 29-2-106.1(3)(a) and (8)(b)(II).

55. CRS § 29-2-106.1(2)(c)(I) and (8)(b)(I).

56. CRS § 29-2-106.1(3)(a) and (8)(b)(II).

57. CRS § 29-2-106.1(2)(c)(II) and (8)(b)(II).

58. CRS § 29-2-106.1(3)(a) and (8)(b).

59. CRS § 29-2-106.1(2); *MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 721 (Colo. 2010).

60. *See Asphalt Specialties, Co. v. City of Commerce City*, 218 P.3d 741 (Colo.App. 2009). Taxpayers may elect to pursue any alternative appellate procedure, such as one under C.R.C.P. 106, that may be provided for in a local jurisdiction's code. CRS § 29-2-106.1(9).

61. CRS § 29-2-106.1(3) and (7).

62. CRS § 29-2-106.1(8).

63. CRS § 26-2-106.1(3)(a) (referencing state procedures at CRS § 39-21-103).

64. CRS § 29-2-106.1(3)(d).

65. CRS § 29-2-106.1(7) and (8)(c) (referencing state procedures at CRS § 39-21-103).

66. CRS § 39-21-105(2)(b).

67. CRS § 29-2-106.1(7).

68. CRS § 29-2-106.1(9); *Asphalt Specialties, Co., supra* note 60.

69. *Asphalt Specialties, Co., supra* note 60 at 746-47.

70. *Walgreen Co., supra* note 11.

71. The assessment of local sales taxes is to be offset by taxes previously paid to another local jurisdiction as required by CRS § 29-2-105(3) and (4). The assessment of local use taxes is to be offset by taxes previously paid to another local jurisdiction as required by CRS § 29-2-109 (1)(f) and (6). A statewide uniform statute of limitations is prescribed by CRS § 29-2-106(8) and refers to the three-year statute of limitations applicable to the assessment, enforcement or collection of Colorado sales and use taxes. *See* CRS §§ 39-21-107, 39-26-125, and 39-26-210. *See, e.g.*, Denver Revised Municipal Code § 53-68.

72. The TABOR Amendment is found at Colo. Const. art. X, § 20, and generally requires an election before taxing jurisdictions may impose a new tax or a tax policy change directly causing a net tax revenue gain without first obtaining (district) voter approval.

73. For example, the federal Internet Tax Freedom Act, 47 U.S.C. § 151, limits state and local governments from imposing taxes on certain Internet transactions. Another form of preemption may apply when local governments seek to impose tax on activity on Indian reservations. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148 (1980). Also, the federal Railroad and Regulatory Reform Act, 49 U.S.C. § 11501, limits any state or subdivision thereof from collecting a tax against certain railroad operations. *See Dep't of Revenue v. Durango & Silverton Narrow Gauge R. Co.*, 989 P.2d 208, 214 (Colo.App. 1999).

74. *Bd. of Comm'rs of Rio Blanco County v. ExxonMobil Oil Corp.*, 192 P.3d 582, 586 (Colo.App. 2008).

75. *Leggett & Platt, Inc. v. Ostrom*, 2010 WL 4361372 at *6 (Colo.App. Sept. 30, 2010).

76. *Id., quoting Rocky Mountain Prestress, Inc. v. Johnson*, 574 P.2d 88. 91 (Colo. 1978), *quoting City & County of Denver v. Sweet*, 329 P.2d 441, 447 (Colo. 1958).

77. *Sec. Life & Accident Co. v. Heckers*, 495 P.2d 225, 226 (Colo. 1972).

78. *Dep't of Revenue v. Woodmen of the World*, 919 P.2d 806, 811 (Colo. 1996).

79. *See Bd. of County Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1273 (Colo. 2001).

80. *Heckers, supra* note 77 at 226.

81. CRS §§ 29-2-105(d) and 39-26-104(c), (d.1), (e), and (f).

82. *Waste Mgmt. of Colo., Inc. v. City of Commerce City*, 2010 WL 1491648 (Colo.App. 2010), *cert. denied* (Jan. 31, 2011).

83. *City of Boulder v. Leanin' Tree*, 72 P.3d 361 (Colo. 2003).

84. *A.D. Store Co. Inc. v. Dep't of Revenue*, 19 P.3d 680 (Colo. 2001).

85. *Leanin' Tree, supra* note 83.

86. *Id.* at 361.

87. *Id.* at 366.

88. *Noble Energy, Inc. v. Colo. Dep't of Revenue*, 232 P.3d 293 (Colo.App. 2010).

89. *AT&T Communications v. City of Boulder*, 775 P.2d 53 (Colo.App. 1989).

90. *Id.* at 54.

91. *Cinemark USA, Inc. v. Seest*, 190 P.3d 793 (Colo.App. 2008); *American Multi-Cinema, Inc. v. City of Westminster*, 910 P.2d 64 (Colo.App. 1995).

92. *American Multi-Cinema, supra* note 91 at 67.

93. *Cinemark USA, supra* note 91 at 799.

94. *Romantix, Inc. v. City of Commerce City*, 240 P.32d 565, 567-68 (Colo.App. 2010).

95. *Int'l Bus. Machines, supra* note 12.

96. *Id.* at 625.

97. *Id.* at 625-26.

98. *Id. See also Conoco, Inc. v. Tinklenberg*, 121 P.3d 893, 896 (Colo.App. 2005) (Taxpayer challenged the assessment of use tax on waste gas that it used and consumed in its own refining and business operations. The waste gas was a by-product of Conoco's refining of crude oil. Although the original purchase of crude oil was acquired tax-free as a wholesale purchase (because the vast majority of it was to be refined and resold as a finished product), the conversion to internal consumptive use caused a "retroactive recognition that a previous sale earlier thought to be wholesale was actually retail.").

99. *Western Paving Const. Co. v. Beer*, 917 P.2d 344, 348 (Colo.App. 1996); *Aggregate Industries WCR, Inc. v. City of Commerce City*, 2010 WL 559134 (Colo.App. 2010).

100. *Int'l Paper Co. v. Cohen*, 126 P.3d 222 (Colo.App. 2005).

101. Generally, only personal property is potentially subject to sales and use tax. These taxes are not imposed on the transfer of real property, improvements, or real property fixtures.

102. CRS § 29-2-109.

103. There is some ambiguity as to whether a use tax assessment based on an estimate is valid. *Compare Rancho Colorado, Inc. v. City of Broomfield*, 586 P.2d 659, 662 (Colo. 1978) (estimate procedure for use tax assessment on materials that have not yet been stored, used, or consumed in the taxing jurisdiction involves impermissible speculation as to what materials in the future may eventually be subject to tax), *with Arapahoe Roofing and Sheet Metal, Inc. v. City and County of Denver*, 831 P.2d 451, 455-56 (Colo. 1992) (limiting the holding in *Rancho Colorado* to the invalidation of a poorly drafted local tax ordinance and permitting a use tax assessment based on building permit estimates of value on the grounds that taxpayer had refused to cooperate with audit and the valuation estimates came from the taxpayer's own building permit applications).

104. *Bd. of County Comm'rs of County of Rio Blanco v. ExxonMobil Oil Corp.*, 192 P.3d 582 (Colo.App. 2008).

105. *Id.* at 588.

106. The Colorado Supreme Court granted *certiorari* in this case, accepted briefing from the parties and *amicus curiae*, and heard oral argument. Subsequently, one justice recused himself and the Court deadlocked 3–3 on whether the court of appeals decision should be affirmed or reversed. By operation of law, the court of appeals decision was affirmed under C.A.R. 35(e). *Bd. of County Comm'rs of Rio Blanco v. ExxonMobil Oil Corp.*, No. 08SC698 (Nov. 9, 2009).

107. *Catholic Health Initiatives v. City of Pueblo*, 207 P. 3d 812 (Colo. 2009).

108. CRS §§ 29-2-105 and 109(1)(d). Most home rule municipalities also recognize an exemption for religious and charitable nonprofit organizations.

109. *Catholic Health Initiatives v. City of Pueblo*, 207 P.3d 812, 814 (Colo. 2009).

110. *Id.* at 818-19.

111. *Id.* at 820.

112. *Id., quoting* Pueblo, Colo. Mun. Code § 14-4-21(5).

113. *Id.* at 825-26, the case was remanded to the district court for further fact finding.

114. *Conoco, Inc., supra* note 98 at 898.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Leggett & Platt, Inc., supra* note 75.

121. *Talbots, Inc. v. Schwartzberg*, 928 P.2d 822 (Colo.App. 1996). ■